87-573

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

LARRY LEE TAYLOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a minor violation of the time limitations of the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, justifies the dismissal with prejudice of an indictment charging a serious crime.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 821 F.2d 1377. The order of the district court dismissing the indictment with prejudice (App., *infra*, 23a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1987. On September 1, 1987, Justice Scalia extended the time within which to file a petition for a writ of certiorari to and including October 11, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Speedy Trial Act of 1974 provides in pertinent part (18 U.S.C. 3162(a)(2)):

> If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. * * * In determining whether to dismiss the case with or without

prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

STATEMENT

On July 25, 1984, respondent was charged in a two-count indictment in the United States District Court for the Western District of Washington. The indictment charged respondent with conspiracy to distribute cocaine, in violation of 21 U.S.C. 846, and possession of 400 grams of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (E.R. 1-2).[1] Trial was scheduled to begin on November 19, 1984, which the parties agreed was one day before the end of the 70-day period allowed for commencing trial under the Speedy Trial Act, 18 U.S.C. 3161(c)(1) (E.R. 13, 109). On the day of trial, however, respondent failed to appear. He was declared to be a fugitive and a bench warrant was issued for his arrest (E.R. 50, 57, 112).

On February 5, 1985, respondent was arrested by local police officers in San Mateo County, California, for failure to appear on local petty theft charges (E.R. 17, 21, 50). Two days later, the United States District Court for the Northern District of California issued a writ of habeas corpus ad testificandum directing the local authorities to make respondent available to appear as a defense witness in *United States* v. *Seigert*, No. CR 84-0689 RFD, a federal narcotics prosecution pending in the Northern District of California (E.R. 42, 50). On February 7, 1985, the United States Marshals Service took custody of respondent pursuant to the writ and arranged for him to be held in the San Francisco County jail pending the *Seigert* trial (E.R. 20, 42). Respondent testified in that case on February 21, 1985, and following his testimony he was held for possible recall in that trial. The *Seigert* trial ended in a mistrial the following day. E.R. 42.

On February 28, 1985, the pending state charges against respondent were dismissed on motion of the district attorney (E.R. 25). The marshal was notified of the dismissal on March 1, which was a Friday (E.R. 51, 81). The State's notice informed the marshal that "effective today [respondent] becomes your prisoner" (E.R. 51).

The following Wednesday (March 6, 1985), respondent appeared before a federal magistrate in the Northern District of California on the outstanding bench warrant and requested a continuance until March 8 (E.R. 43, 74-81). On March 8, the magistrate, at respondent's request, ordered a physical and psychiatric examination of respondent (E.R. 43, 86-87). At the March 8 hearing, defense counsel also informed the court that he was in no hurry to return respondent to Washington (E.R. 85):

> I assume that we are going to return, Your Honor. What I propose is we set a removal hearing[.] * * * I would not take the Court's time to have a removal hearing, but I would rather keep him here and organize what is gonna happen and talk to [Assistant U.S. Attorney] Wales up in Seattle.

The court scheduled a status conference on the removal hearing for March 18 (E.R. 86). On that date, at respondent's request, the hearing was set for April 3 (E.R. 88-89).[2] At the time set for the hearing, respondent waived the

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[1] "E.R." refers to the Excerpt of Record filed in the court of appeals. It contains the pleadings, exhibits, and affidavits on which the district court based its ruling on the speedy trial motion. There was no hearing on that motion.

[2] The only issue at that hearing would be whether respondent was the individual named in the warrant. Fed. R. Civ. P. 40.

removal hearing and was ordered removed to the Western District of Washington (E.R. 52, 56, 60-61).

Over the next 14 days, the marshal, in accordance with standard procedures, assembled several prisoners who had to travel northward (E.R. 43, 52-53). On April 17, 1985, respondent began his trip to Washington. The following day, while respondent was in Oregon, the district court in the Northern District of California issued a second writ of habeas corpus ad testificandum, compelling respondent's presence at the retrial in the *Seigert* case. While respondent was waiting to testify in that case, a superseding indictment was returned on April 24 in the Western District of Washington. The superseding indictment added to the two narcotics counts a third count charging respondent with failing to appear before a court as required, in violation of 18 U.S.C. 3150. E.R. 3-5. The *Seigert* retrial began on May 7, 1985. Respondent was returned to the Western District of Washington on May 17, 1985 (E.R. 44, 43). Before he could be retried, he moved to dismiss the superseding indictment, asserting a violation of the Speedy Trial Act's 70-day time limitation.

2. The district court granted respondent's speedy trial motion and dismissed the two counts charging respondent with narcotics offenses (App., *infra*, 23a-33a).[3] The court found that only one day remained on the speedy trial clock when respondent failed to appear at trial in November 1984. Accordingly, the court held, the government had only one day of non-excludable time within which to bring respondent to trial following his capture on February 7, 1985.

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[3] The court's determination that the Act had been violated applied only to the two cocaine counts, which had been charged in the original indictment. The court found no speedy trial violation with respect to the failure to appear count that was added in the superseding indictment. App., *infra*, 32a-33a. Respondent subsequently pleaded guilty to that count.

In calculating the speedy trial time that had expired before trial began, the court excluded the 78-day period between respondent's November trial date and his capture in February as time during which the respondent was "absent" under Section 3161(h)(3)(A) of the Act. The court also excluded the delay between February 7 and February 22 as delay attributable to the pending state charges and respondent's appearance at the first trial in the *Seigert* case. But the court found that the speedy trial clock began to run on February 23, the day after the first *Seigert* trial ended. The court counted the seven days through and including March 1, even though the state charges were still pending at that time, because the United States Marshals Service had not returned respondent, who was housed in the San Francisco jail, to the formal custody of the state authorities. In addition, the court counted the next five days as non-excludable time for speedy trial purposes. The court concluded that once the marshal learned on March 1 that the state charges had been dismissed, the marshal should have brought respondent before a federal magistrate immediately for an initial appearance on the bench warrant. See Fed. R. Crim. P. 40(a). Because the marshal did not do so until March 6, the court refused to exclude the preceding five-day period.

Applying Section 3161(h)(1)(G), the district court excluded the entire period between respondent's initial appearance on the bench warrant on March 6 and the removal order on April 3 as delay resulting from the removal proceedings. The court excluded the next ten days as a reasonable period of time for transporting respondent back to Washington, under Section 3161(h)(1)(H). The court, however, refused to exclude the full 14 days that it took the marshal to arrange for respondent's transportation back to Washington. In the district court's view, the marshal had improperly elevated his concern for the economies resulting from group transportation over respondent's right to a speedy trial. Finally, the court ex-

cluded all the remaining delay as resulting from the second writ of habeas corpus ad prosequendum in the *Seigert* case and respondent's second journey to Washington.

In accordance with its tabulation of the speedy trial time, the court concluded that a total of 15 non-excludable days had elapsed since respondent's apprehension. Because the parties agreed that there was only one day left on the speedy trial clock when respondent absconded, the court found that the 70-day limit of the Act had been exceeded by 14 days and that the indictment therefore had to be dismissed.[4]

The district court then considered whether to dismiss the indictment with or without prejudice. The court acknowledged that the offenses at issue were serious, but it held that the circumstances leading to the Speedy Trial Act violation tended "strongly to support the conclusion that the dismissal must be with prejudice" (App., *infra*, 30a). The court characterized the government's behavior after

[4] The conclusion reached by the court and the parties that there was only one day left for trial as of November 19, 1984, was based on a now-outmoded method of calculating speedy trial time. Under that method, which was recommended by the Judicial Conference's *Guidelines to the Administration of the Speedy Trial Act of 1974, as amended* 68-70 (rev. Dec. 1979 (with amendments through Oct. 1984)), an "ends of justice" continuance granted under Section 3161(h)(8) would be "tacked on" to the end of the 70-day limitation period; it would not stop the running of the speedy trial clock at the time the continuance was granted. Therefore, when the continuance ended, the speedy trial period would expire as well. It is now clear that that is not the correct method for calculating speedy trial time. Instead, the courts that have analyzed the issue have held that the grant of a continuance stops the speedy trial clock altogether until the continuance comes to an end. Under that method of calculation, there would have been 42 days of speedy trial time left at the time respondent became a fugitive, so that there would have been no speedy trial violation in this case. See, *e.g.*, *United States* v. *Gallardo*, 773 F.2d 1496 (9th Cir. 1985); *United States* v. *Campbell*, 706 F.2d 1138 (11th Cir. 1983). We did not raise that argument in the courts below and we do not press it here.

respondent's recapture as "lackadaisical" (*ibid.*), pointing to the failure to return respondent to state custody after his first appearance in *Seigert*, the five-day interval between the notice of the dismissal of the state charges and respondent's appearance on the bench warrant, and the 14-day period after the removal order before respondent was sent to Washington (*ibid.*). Based on the government's conduct, the court concluded that the indictment had to be dismissed with prejudice, or else "the [Speedy Trial Act] would become a hollow guarantee" (App., *infra*, 31a).

3. In a divided opinion, the court of appeals affirmed the dismissal of the indictment with prejudice (App., *infra*, 1a-22a). The court of appeals agreed with the district court that the Act's 70-day limit had been exceeded by 14 days (*id.* at 16a). The court also upheld the district court's decision to dismiss the indictment with prejudice. It looked at the factors enumerated in Section 3162(a)(2) and acknowledged that several of those factors favored dismissal without prejudice. For instance, the court agreed with the district court that the offenses were serious. The court also conceded that the length of the delay was "not so great as to mandate dismissal with prejudice" (App., *infra*, 17a). And the court found "no indication" that the delay had impaired respondent's defense. Nonetheless, the court asserted that respondent had suffered prejudice in that he was incarcerated during the entire period (*ibid.*). Moreover, the court concluded that the purpose of the district court's order was to send "a strong message to the government" that the Speedy Trial Act "must be observed despite the government's apparent antipathy toward a recaptured fugitive" (*id.* at 18a). For that reason, the court concluded that the district court had not abused its discretion by entering a "with prejudice" dismissal.

Judge Poole dissented on the remedy issue, concluding that the district court had abused its discretion by dismissing the indictment with prejudice (App., *infra*, 19a). Judge Poole found that the government was not at fault for the delay prior to March 1, when the marshal learned that the

state charges had been dismissed.[5] Noting that the marshal had learned about the dismissal of the state charges on a Friday, Judge Poole further concluded that the marshal could not be charged with neglect for not bringing respondent before a magistrate until the following Wednesday (App., *infra*, 21a). Judge Poole also explained (*id.* at 21a-22a) that it took the marshal 14 days rather than 10 days to transport respondent back to Washington after his removal hearing because of the delay necessary "to collect a larger number of prisoners for simultaneous transport in order to effect economy of expenses."

In light of these considerations, Judge Poole concluded that the delay in the case, although non-excludable under the statute, was not "of such studied, deliberate, and callous nature as to justify dismissal with prejudice" (App., *infra*, 22a). Judge Poole further found it incongruous that by fleeing the day before his scheduled trial, respondent became "the instrument of his own deliverance" (*ibid.*). As Judge Poole explained, respondent "created his own 78-day 'excludable time' by his own will, traveling from Seattle to California where he became the subject of criminal charges in two jurisdictions 800 miles away from the place of trial." Judge Poole found it "ironic that the statutory scheme which would have assured his orderly trial in November 1984, is resorted to, five months later, as the reason for 'springing' him to freedom and conferring upon him complete absolution from further prosecution" (*ibid.*). To release respondent

[5] Judge Poole observed that the San Mateo authorities could have obtained custody of respondent, who was incarcerated during and after the *Seigert* trial in the San Francisco County jail, simply by asking the marshal to sign off on the required papers. Furthermore, Judge Poole concluded that the government could not be faulted for failing to return respondent to Washington during that period, since the California state charges were still pending at that time. App., *infra*, 20a-21a.

altogether because of the minor violation of the Speedy Trial Act, Judge Poole concluded, "reflects badly upon our notions of sound, evenhanded administration of justice" (*ibid.*).

REASONS FOR GRANTING THE PETITION

The court of appeals believed that dismissal with prejudice was justified to teach the government a lesson about the speedy trial rights of fugitives (App., *infra*, 18a). But the decision below also contains lessons for others that are entirely inconsistent with the purposes of the Speedy Trial Act. The decision instructs defendants that the Act can be used as a tool to convert flight into complete immunity from prosecution; it instructs trial courts that they may dismiss a case with prejudice whenever it seems appropriate to them; and it instructs appellate courts that the decision of a district court to dismiss a case with prejudice is practically unreviewable. In addition to misapplying the Speedy Trial Act and ignoring the intent of Congress, the decision in this case conflicts with the rationale of decisions in several other circuits. Review of the decision is accordingly needed to provide guidance to the lower courts in construing Section 3162(a), the sanctions provision of the Act.

a. When the 70-day time limit of the Speedy Trial Act is violated, the indictment must be dismissed.[6] 18 U.S.C. 3162(a). When such a dismissal is entered, the district court must determine whether the government may reindict the defendant and begin the prosecution anew. 18 U.S.C. 3162(a)(2). The Act directs that in making that

[6] Section 3161(c)(1) requires that trial commence within "70 days of the latest of a defendant's indictment, information, or appearance, barring periods of excludable delay." *Henderson* v. *United States*, No. 84-1744 (May 19, 1986), slip op. 5.

determination, the district court must balance several factors, including the seriousness of the offense, the facts and circumstances leading to the dismissal, and the impact of a reprosecution on the administration of the Speedy Trial Act and on the administration of justice (*ibid.*). Balancing those factors requires the district court to exercise its discretion; the court cannot arbitrarily ignore the direction in which the scale tips. In this case, the statutory factors overwhelmingly favor dismissal without prejudice. Accordingly, the district court was not free to disregard the statutory balancing test simply in order to teach the government a lesson about the speedy trial rights of fugitives. Cf. *United States* v. *Morrison*, 449 U.S. 361, 364 (1981) ("remedies should be tailored to the injury suffered * * * and should not unnecessarily infringe on competing interests"). In practical effect, by barring reindictment in this case ostensibly to prevent the Speedy Trial Act from becoming "a hollow guarantee" (App., *infra*, 31a), the district court read into the Act a strong presumption in favor of dismissal with prejudice. In doing so, the court violated the mandate of Congress.

In 1974, when the Speedy Trial Act was enacted, the dismissal sanction was its most controversial and hotly debated provision. See 120 Cong. Rec. 41773-41774 (1974) (remarks of Rep. Conyers, introducing bill); A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 193-222 (Fed. Judicial Center 1980) [hereinafter Partridge]. The House bill, H.R. 17409, 93d Cong., 2d Sess. § 101 (1974), reprinted in Partridge at 345, provided that a speedy trial dismissal "shall forever bar prosecution of the individual for the offense or any offense based on the same conduct." The Senate bill was nearly as stringent. It permitted reindictment only where "the attorney for the government has presented compelling evidence that the delay was caused by exceptional circumstances." S. 754, 93d Cong., 2d Sess. § 101 (1974), reprinted in Partridge at 318.

Congress, however, was unwilling to pass either bill with those harsh sanctions. 120 Cong. Rec. 41778 (1974) (remarks of Rep. Wiggins, explaining bill's provisions); *id.* at 41794 (remarks of Rep. Conyers). Consequently, during the House floor debates, an amendment was proposed and adopted that modified the sanctions provision of the bill (*id.* at 41774-41775, 41778, 41793-41794). The amendment gave the district court two options upon finding a speedy trial violation: dismissal with or without prejudice. To determine which option was appropriate, the amendment "require[d] consideration of several factors by the court." *Id.* at 41778 (remarks of Rep. Wiggins); accord *id.* at 41794 (remarks of Rep. Dennis). As Congressman Wiggins, one of the amendment's sponsors, explained (*id.* at 41778):

> No factor, nor combination of factors, requires, however, a particular form of dismissal. In most cases it is to be expected that no dismissal with prejudice will be ordered unless actual prejudice to the defendant can be shown occasioned by the further delay implicit in a refiling in the case against him, and that the actual prejudice to the defendant outweighs societal interests in prosecuting the alleged offender.

The amendment was adopted without further modification. *Id.* at 41619, 41796.

The legislative history of the Speedy Trial Act thus confirms that there is no presumption in favor of dismissals with prejudice. See *United States* v. *Salgado-Hernandez*, 790 F.2d 1265, 1267 (5th Cir.), cert. denied, No. 86-5229 (Nov. 17, 1986); *United States* v. *Brown*, 770 F.2d 241, 244 (1st Cir. 1985), cert. denied, 474 U.S. 1064 (1986); *United States* v. *Caparella*, 716 F.2d 976, 978-980 (2d Cir. 1983). On the contrary, the premise of the amendment to the sanctions provision of the Act was that dismissals without prejudice would be an adequate sanction for most statutory speedy trial violations. Moreover, the legislative history of that amendment shows that Congress intended

the district courts to perform the balancing test set forth in Section 3162(a)(2) in selecting a sanction. Finally, the contemporaneous explanations of the amendment by its sponsors make clear that Congress intended to permit reprosecution where the offense was serious and the defendant was not prejudiced by the speedy trial violation.[7]

b. We do not challenge the district court's ruling that the Speedy Trial Act was violated in this case.[8] Dismissal

[7] Five years later, Congress suspended the implementation of the dismissal sanction for one year. 18 U.S.C. 3163(c); Pub. L. No. 93-619, § 101, 88 Stat. 2080 (codified at 18 U.S.C. 3163). In discussing this suspension, the House Report stated in passing:

> While the act does permit dismissal without prejudice, extensive use of this procedure could undermine the effectiveness of the act and prejudice defendants, and the committee intends and expects that use of dismissal without prejudice will be the exception and not the rule.

H.R. Rep. 96-390, 96th Cong., 1st Sess. 8-9 (1979). Because Congress was not at that time considering a modification to Section 3162(a)(2), that observation, made five years after the enactment of that provision, is not entitled to much weight. It cannot override the contrary contemporaneous legislative history from 1974 that led to the enactment of the sanctions provision as it exists today. In 1974, Congress specifically rejected the Senate bill, which limited reprosecution to exceptional cases.

[8] The courts below identified three periods of non-excludable delay: the six days between the conclusion of the first *Seigert* trial and the day on which the state charges were dismissed; the six days between the date on which the federal marshals were notified of that dismissal and the date on which respondent was taken before a federal magistrate on the outstanding bench warrant; and the four days of extra travel time on the first attempt to return respondent to Washington. We believe that the courts erred in refusing to exclude the period between the conclusion of the first *Seigert* trial (February 22) and the day on which the state charges were dismissed (February 28). The Speedy Trial Act does not require the marshal to interfere with state proceedings. Accordingly, he was under no obligation to return respondent to Washington before the state charges were dropped. 18 U.S.C. 3161(h)(1)(D); *United States* v. *Bigler*, 810 F.2d

of the indictment was therefore appropriate. We do, however, contend that when the factors comprising the

1317, 1320-1321 (5th Cir. 1987); *United States* v. *Redmond*, 803 F.2d 438, 440 (9th Cir. 1986); *United States* v. *O'Bryant*, 775 F.2d 1528, 1532 (11th Cir. 1985); *United States* v. *Rodriguez-Franco*, 749 F.2d 1555, 1559 n.2 (11th Cir. 1985); *United States* v. *Lopez-Espindola*, 632 F.2d 107, 109-111 (9th Cir. 1980); *United States* v. *Goodwin*, 612 F.2d 1103, 1105 (8th Cir. 1980). The district court did not suggest that the marshal should have returned respondent to Washington during that period. The court, however, faulted the marshal for not moving respondent from the San Francisco County jail to the county jail in neighboring San Mateo County, where the state charges were pending. But such a move was unnecessary and should have no effect on the speedy trial calculations. The sheriff in San Francisco was under court order to deliver respondent to San Mateo authorities upon request. E.R. 20. The marshal's failure to move respondent to San Mateo County in no way impeded the State's ability to prosecute respondent on the local charges.

We do not dispute the district court's conclusion that the other two periods were not excludable. Although the marshal learned at some time on Friday, March 1, that the outstanding state charges had been dismissed, respondent was not taken before a federal magistrate for an initial appearance on the outstanding bench warrant until the following Wednesday, March 6. The district court counted that period as constituting a five-day delay for speedy trial purposes. Second, Section 3161(h)(1)(H) of the Act establishes the presumption that any transportation time in excess of 10 days is unreasonable, and the marshal did not arrange for respondent's transportation to Washington after the first *Seigert* trial until 14 days after the removal order. Although we believe that in an appropriate case the presumption can be rebutted by showing that the extra time taken was justified by economic or security considerations, we do not contend that such a showing was made here. Accordingly, because the marshal took four more days than the Act generally allows to return the fugitive respondent to the charging district, we do not challenge the decision of the lower courts to count those four days. We therefore acknowledge that nine speedy trial days elapsed after respondent's capture. When added to the 69 days that the parties agreed had elapsed before respondent absconded, the 70-day limit of the Act was exceeded by eight days.

mandatory balancing test are weighed, the scale tips heavily in favor of dismissal without prejudice.

The first factor in the test is the seriousness of the offense. As both courts below agreed, conspiracy to distribute cocaine and possession of cocaine with the intent to distribute it are serious crimes. See also *United States* v. *May*, 819 F.2d 531, 535 (5th Cir. 1987); *United States* v. *Simmons*, 786 F.2d 479, 485 (1986), rev'd on other grounds on rehearing, 812 F.2d 818 (2d Cir. 1987); *United States* v. *Brown*, 770 F.2d at 244; *United States* v. *Carreon*, 626 F.2d 528, 533-534 (7th Cir. 1980). The courts of appeals have held that where the the offense is serious, the indictment should be dismissed with prejudice only for a "correspondingly serious" delay in violation of the Act. *United States* v. *Salgado-Hernandez*, 790 F.2d at 1268; *United States* v. *Simmons*, *supra*; *United States* v. *Phillips*, 775 F.2d 1454, 1455-1456 (11th Cir. 1985); *United States* v. *Hawthorne*, 705 F.2d 258, 260-261 (7th Cir. 1983); *United States* v. *Carreon*, *supra*. Here, however, the delay in our view was eight days, and even in the district court's view it was only 14 days. That period of delay is not "correspondingly serious." See, *e.g.*, *United States* v. *Brown*, *supra* (35-day delay not serious); *United States* v. *Hawthorne*, *supra* (9-day delay not serious); *United States* v. *Melguizo*, No. 87-2198 (5th Cir. Aug. 4, 1987) (same); *United States* v. *Bittle*, 699 F.2d 1201, 1208 (D.C. Cir. 1983) (13-day delay not serious). Compare *United States* v. *Stayton*, 791 F.2d 17, 21-22 (2d Cir. 1986) (23-month delay serious); *United States* v. *Russo*, 741 F.2d 1264, 1267 (11th Cir. 1984) (several-month delay serious). As the Seventh Circuit has noted, where Congress has provided for alternative sanctions, "the purpose of the Act would not be served by requiring the court to impose the maximun sanction for a minimum violation." *United States* v. *Hawthorne*, 705 F.2d at 261. Hence, the first factor in the balancing test strongly favors dismissal without prejudice.

The second factor—the circumstances that led to the dismissal—also strongly favors dismissal without prejudice. The delays here were not attributable to any intentional government misconduct or even any negligence that prejudiced respondent in any way.[9] Cf. *United States* v. *Loud Hawk*, No. 84-1361 (Jan. 21, 1986), slip op. 12-13. Moreover, any delay in the ultimate date of respondent's trial resulted from respondent's failure to appear on the scheduled day of trial. The government was prepared to go to trial, as scheduled, on November 19, 1984. The government did nothing to postpone that trial date. Respondent, however, was obviously less interested in speedy justice. Rather than submit to the jurisdiction of the court for a swift adjudication of his guilt or innocence, respondent fled, thereby postponing the proceedings indefinitely. It was respondent's fault that the marshal was called in, upon respondent's capture by state authorities, to undo what respondent had done, namely, to return respondent to the site of the trial. For purposes of this case, we do not dispute that the marshal was slower in performing this task than the Speedy Trial Act permits. But it was respondent—not the marshal—who was principally responsible for

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[9] It is reasonably clear that the eight-day period that constituted the violation in this case did not have the effect of delaying respondent's trial date. Respondent was returned to California to testify at the *Seigert* retrial on April 18. Even absent the delay in initiating the removal proceedings and in taking him from California after the removal order, it is unlikely that respondent would have arrived in Washington before early April. And it is highly unlikely that respondent's trial could have been held during the period between his return to Washington and April 18, when the district court ordered him returned to California, particularly since respondent's counsel was heavily involved in the *Seigert* case. The government and defense counsel would surely have sought, and been granted, a continuance of respondent's trial under Section 3161(h)(3)(B)(8) of the Speedy Trial Act until after the completion of the *Seigert* trial.

the loss of his opportunity for a speedy trial. And it was respondent, not the marshal, who violated the public's right to speedy justice by his flight from prosecution. A defendant who deliberately delays his trial should rarely, if ever, be entitled to the ultimate, irrevocable sanction of dismissal with prejudice. *United States* v. *Peeples*, 811 F.2d 849, 851 (5th Cir. 1987); *United States* v. *McAfee*, 780 F.2d 143, 146 (1985), vacated on other grounds, No. 85-1959 (Oct. 6, 1986), on remand, 808 F.2d 862 (1st Cir. 1986). Cf. *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970) (flight "disentitles the defendant to call upon the resources of the Court for a determination of his claims"). As the dissenting judge below observed, the Speedy Trial Act should not be interpreted to let a defendant "be the instrument of his own deliverance" (App., *infra*, 22a).

Although Section 3162(a) does not explicitly state that prejudice to the defendant is one of the factors in the balancing test, the legislative history of the Act makes it clear that Congress intended that prejudice would be a circumstance to be weighed in the balance. 120 Cong. Rec. 41778, 41794-41795 (1974).[10] The courts of appeals agree. *United States* v. *Peeples*, *supra*; *United States* v. *Phillips*, *supra*; *United States* v. *Brown*, *supra*; *United States* v. *Bittle*, *supra*; *United States* v. *Carreon*, *supra*. Respondent has never claimed that his ability to defend against the charges has been impaired by the delay in returning him to Washington for trial.[11] See *United States* v. *Loud Hawk*,

[10] As the legislative history explains, Congress chose not to list prejudice as a factor for fear that it would become the dispositive factor in every case. Nevertheless, every Congressman to address the question of prejudice during the debates expressed the view that prejudice should play an important role in the overall balancing test. 120 Cong. Rec. 41778, 41794-41795 (1974) (remarks of Reps. Dennis, Wiggins, Cohen, and Conyers).

[11] Indeed, respondent consistently showed by his actions that he did not object to delays. He not only deliberately delayed trial by absconding; even after his recapture, respondent showed no interest in a prompt return to Washington for trial. Although he now complains that he was not brought before a federal magistrate on the bench warrant until the Wednesday following the Friday on which the marshal was notified of the dismissal of the state charges, he made it clear at the time that he was quite ready to postpone the completion of the removal procedures. It was largely because of delays sought by respondent, including his refusal to waive the formality of an identification hearing until the day scheduled for it, that these proceedings were not completed for almost a month.

slip op. 12 ("[D]elay is a two-edged sword. It is the government that bears the burden of proving its case beyond a reasonable doubt. The passage of time may make it difficult or impossible for the government to carry this burden."). The court of appeals nevertheless found that respondent suffered prejudice because he was incarcerated during the period of the delay. During that period, however, respondent was lawfully incarcerated because of his failure to appear for trial in November 1984. The speedy trial violation on the narcotics charges was therefore not the cause of his being held in custody during that period. For that reason, the court of appeals erred in considering incarceration as a form of prejudice in this case. See *United States* v. *Salgado-Hernandez*, 790 F.2d at 1268-1269. In sum, the circumstances of this case, including the absence of actual prejudice, indicate that the second factor in the balancing test favors a dismissal without prejudice.

Finally, by the terms of Section 3162(a), the courts are required to consider "the impact of a reprosecution on the administration of this chapter and on the administration of justice." A reprosecution in this case would serve the administration of justice in two ways. First, it would send a message to defendants that they will not profit by absconding. They cannot flout the public's right to speedy justice and expect to gain complete absolution when their

flight precipitates a technical violation of the Act.[12] Second, a reprosecution would serve the public's interest in seeing that narcotics offenders are justly punished. See *Barker* v. *Wingo*, 407 U.S. 514, 519-521 (1972); cf. *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978).

The only statutory factor that could be regarded as cutting in respondent's favor is the effect of a reprosecution on the administration of the Speedy Trial Act. Complete absolution is more likely than a dismissal without prejudice to lead to modifications in procedures that will assure more rapid pretrial processing. In one sense, of course, that factor will always weigh in favor of dismissal with prejudice: by increasing the penalty for noncompliance, compliance is always encouraged. Yet by providing for dismissal without prejudice in many cases, Congress indicated that it did not believe the drastic sanction of dismissal with prejudice would always be necessary or appropriate to induce compliance with the Act. Contrary to the assumption of the courts below (App., *infra*, 17a-18a, 30a-31a), dismissal without prejudice is not a toothless sanction, and should suffice in many cases to encourage modifications in procedures. When a dismissal is ordered after trial or on appeal, the case must be retried. Even when the dismissal occurs before trial, the government must begin its case over again by resubmitting the case to a grand jury and by running the risk that the statute of limitations may have expired in the meantime. Thus, the district court's conclusion that a dismissal without prejudice would make the Act a "hollow guarantee" (App., *infra*, 30a-31a) is contrary to both the judgment of Congress and the realities of criminal practice.

[12] It is no answer to say, as did the court of appeals (Pet. App. 10a-11a), that defendants who abscond are still subject to prosecution for absconding. As long as the maximum sentence for failure to appear is lower than the maximum total sentence on all the charges from which the defendant is fleeing—as was the case here—the defendant will have an incentive to abscond if he is reasonably sure that if he is captured the government will not be able to return him and arrange for his trial within the remaining speedy trial time.

When all the factors are weighed, the scale tips overwhelmingly in favor of dismissal without prejudice. In these circumstances, the district court cannot ignore the balancing test and select instead the maximum remedy under the guise of exercising its discretion. See *United States* v. *Kramer*, No. 86-5217 (8th Cir. Aug. 17, 1987) (reversing dismissal with prejudice as an abuse of discretion); *United States* v. *Phillips*, 775 F.2d at 1455-1456 (same). Although the trial court retains discretion in a case where the factors are closely balanced, this discretion is not unfettered. The court must apply the guidelines imposed by Congress. As the court of appeals explained in *Kramer*, slip op. 10:

> An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment.

Here, the district court did not give sufficient weight to the seriousness of the offense, the brevity of the delay, the lack of prejudice, and the role of respondent's flight in precipitating the violation. The court made a clear error in judgment when it dismissed these factors as secondary to the need to teach the government a lesson about the speedy trial rights of fugitives. In so doing, the court exceeded its authority under the Act.

c. In affirming the "with prejudice" dismissal, the court of appeals failed to follow the principles enunciated in other circuits for determining the appropriate sanction. For instance, as we have noted, the decision in this case is contrary to the decisions of other courts that have held that where the offense is serious, the indictment should be

dismissed with prejudice only for a correspondingly serious delay. See, *e.g.*, *United States* v. *Simmons, supra; United States* v. *Salgado-Hernandez, supra; United States* v. *Hawthorne, supra; United States* v. *Carreon, supra; United States* v. *Phillips, supra.*

Likewise, the decision in this case is contrary to decisions of the First and Fifth Circuits, which have refused to grant the maximum sanction to a defendant who is in some way responsible for the delay. *United States* v. *McAfee, supra; United States* v. *Peeples,* 811 F.2d at 852. Cf. *United States* v. *Snowden,* 735 F.2d 1310, 1313 (11th Cir. 1984). And, the decision of the court below is at odds with decisions of the Eighth and Eleventh Circuits (*United States* v. *Kramer, supra,* and *United States* v. *Phillips, supra),* because it gives the district court unchecked discretion to choose a remedy without regard to the outcome of the statutorily mandated balancing test. See also *United States* v. *Tunnessen,* 763 F.2d 74, 79-80 (2d Cir. 1985). As both *Kramer* and *Phillips* hold, the factors set forth in Section 3162(a)(2) may not be ignored, and even when the district court purports to consider those factors, a serious misapplication of the factors requires correction by an appellate court. Review by this Court is warranted to resolve these disagreements regarding the proper application of the Speedy Trial Act dismissal sanction.

Justice is generally served when a criminal case is resolved on the basis of the defendant's guilt or innocence. Here, the lower courts have given respondent his freedom without such a determination. There was no constitutional violation in this case; there was no egregious behavior on the part of the government; and there was no intentional disregard of respondent's statutory speedy trial rights. At worst, there was an inadvertent, technical violation of the Act by the marshal. Dismissal of the indictment without prejudice is more than adequate to deter such mistakes in the future. Complete absolution, on the other hand, is a

remedy totally disproportionate to the injury suffered or the need to enforce compliance with the Act, and it is a penalty that society should not be forced to suffer.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1987

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-3127

UNITED STATES OF AMERICA, PLAINTIFF/APPELLANT

v.

LARRY LEE TAYLOR, DEFENDANT/APPELLEE

On Appeal from the United States District Court
for the Western District of Washington—
Barbara J. Rothstein, United States District Judge,
Presiding

Argued and Submitted
August 4, 1986—Seattle, Washington

Filed July 13, 1987

OPINION

Before: Cecil F. Poole, William A. Norris and
Robert R. Beezer, Circuit Judges.

Opinion by Judge Beezer; Partial Concurrence and
Partial Dissent by Judge Poole

BEEZER, Circuit Judge:

The United States appeals from the district court's dismissal with prejudice, under the Speedy Trial Act ("STA"), 18 U.S.C. §§ 3161-3174, of its superseding indictment charging defendant Larry Lee Taylor with con-

spiracy to possess cocaine and possession with intent to distribute. The dismissal was granted based upon the government's violation of the STA's 70-day indictment-to-trial provision, 18 U.S.C. § 3161(c)(1).

The government contends the 70-day STA time "clock" should start over when a fugitive is apprehended after failing to appear for trial. The government also contends that the district court improperly computed the delays excludable under the STA. Finally, the government maintains that the district court abused its discretion in dismissing the indictment with prejudice. We affirm.

I

BACKGROUND

Larry Lee Taylor was indicted on July 25, 1984, for conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846, and for actual possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A), and 18 U.S.C. § 2. He was scheduled for trial on these criminal charges before the United States District Court for the Western District of Washington on November 19, 1984. Taylor failed to appear for trial and a fugitive bench warrant was issued. Taylor was apprehended in California on February 5, 1985, by officers of the San Mateo County sheriff's department.

After his arrest, Taylor was held in San Mateo County jail on both the federal bench warrant and a state bench warrant issued following Taylor's failure to appear for trial on a petty theft charge. The federal government obtained a superseding indictment on April 24, 1985.[1]

[1] The superseding indictment contained a third count, failure to appear for trial in violation of 18 U.S.C. § 3150 [now § 3146], to which Taylor pleaded guilty. The term "superseding indictment" refers to a second indictment issued in the absence of a dismissal of the original indictment. *United States v. Rojas-Contreras*, 474 U.S. 231 (1985).

Taylor was transferred from San Mateo County custody to federal custody on February 7, 1985, pursuant to a writ of habeas corpus ad testificandum issued by the United States District Court for the Northern District of California to obtain his testimony in another federal narcotics case, *United States v. Seigert*. He testified in the *Seigert* trial on February 21, and was held for possible recall in *Seigert* through February 22.

On February 28, the charges pending against Taylor in San Mateo County were dismissed, and the United States Marshal Service ("USMS") was notified on March 1 that local holds were released. On March 6, Taylor made an initial appearance on the federal fugitive warrant before a magistrate in the Northen District of California. On April 3, the magistrate signed an order directing that defendant be transported to the Western District of Washington.

On April 8, Taylor was transferred from San Francisco County Jail to Sutter County Jail while the USMS waited to assemble other prisoners for transport to Oregon and Washington rather than traveling with defendant alone. On April 17, Taylor was transported to Portland, Oregon, but the following day the United States District Court for the Northern District of California issued a second writ of habeas corpus ad testificandum ordering defendant returned to California for the retrial of *Seigert*. Taylor was returned to California on April 23, retrial began around May 7, and on May 17 he was transported to the Western District of Washington. On April 24, a grand jury in the Western District had returned a superseding indictment, adding a charge of failure to appear to the original narcotics charges.

After Taylor's return, the United States District Court for the Western District of Washington held that, since only one day had remained on the STA clock when trial was scheduled on November 19, 1984, and since the clock did not begin anew when defendant was arrested on February 5, the court had to examine the time which had

elapsed between his disappearance on November 19, 1984, and the issuance of the superseding indictment on April 24, 1985, to determine which delays were excludable under 18 U.S.C. § 3161(h). The court concluded that fifteen days of the delay were not excludable. Since the STA clock had expired fourteen days before Taylor was brought to trial, the district court dismissed the narcotics charges under the superseding indictment.

II

RESTARTING THE CLOCK

We review de novo the district court's interpretation of the provisions of the Speedy Trial Act. *United States v. Gallardo,* 773 F.2d 1496, 1501 (9th Cir. 1985); *United States v. Henderson,* 746 F.2d 619, 622 (9th Cir. 1984), *aff'd,* ____ U.S. ____, 106 S.Ct. 1871 (1986).

The STA, 18 U.S.C. § 3161(c)(1), "operates like a statute of limitations." *United States v. Mehrmanesh,* 652 F.2d 766, 769 (9th Cir. 1980). Pursuant to the statute, a defendant must be brought to trial within 70 days from the later of (1) the filing date of the information or indictment or (2) the date of his initial appearance before a judicial officer in the charging district. The STA provides numerous exclusions from this 70-day period. *See* 18 U.S.C. § 3161(h). But if the defendant is not brought to trial within the 70-day period plus the period allowed under the exclusion, the court must dismiss the indictment on motion of the defendant. 18 U.S.C. § 3162(a)(2).

The district court concluded that the time which elapsed between Taylor's failure to appear for trial on November 19, 1984, and his apprehension on February 5, 1985, was excludable under 18 U.S.C. § 3161(h)(3)(A), (B). This section provides:

> (h) The following periods of delay shall be excluded . . . in computing the time within which the trial of

> any such offense must commence:
>
> . . .
>
> 3(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.
>
> (B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obained by the due diligence or he resists appearing at or being returned for trial.

As applied under the facts of this case, section 3161(h)(3) clearly tolled the STA time "clock" for that period during which Taylor was a fugitive. However, upon his apprehension, the clock simply resumed from the point at which it was stopped by defendant's absence. In this case, there was one day remaining before Taylor was to be tried. According to the district court, fifteen days after Taylor's arrest were identified as unexcludable under STA. As a consequence, the government failed to comply with the statutory time period by fourteen days.

The United States contends that section 3161(h)(3) does not control under the circumstances of this case. The government instead argues that the clock should have been restarted on Taylor's apprehension, thereby giving the government an additional 70 days within which to bring Taylor to trial upon the superseding indictment.

Although the government failed to cite any authority for this proposition, we have discovered the following dicta in a footnote of an Eleventh Circuit decision:

> Appellant assumes, as do we, that where a defendant fails to appear for trial and is recaptured a year later

> and placed in federal custody, the Government has 70 days in which to try him for the offense for which he was originally charged. Requiring that the period during which a defendant is a fugitive be excluded from the original 70-day calculation would be unfair to the government, for if defendant became a fugitive 69 days after his initial appearance before a judicial officer, upon his recapture one year later, the Government would have only one day to try him for the original offense. We reject, however, the Government's argument that upon becoming a fugitive, a defendant waives his right to speedy trial upon recapture. Requiring that the 70-day period begin anew upon a defendant's recapture is the most reasonable result.

United States v. Studnicka, 777 F.2d 652, 657 n.16 (11th Cir. 1985).

However, all other courts which have considered the problem presented when a defendant had been at large for some period after the STA time clock had started, with the filing of an indictment or an initial appearance, have held that the delay occasioned by the defendant's absence should simply be excluded under section 3161(h)(3).[2] None of these decisions suggests that the clock should be restarted upon the defendant's apprehension.

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[2]*See, e.g., United States v. Greene,* 737 F.2d 572, 576 (6th Cir. 1984) (court excluded delay before arraignment which was occasioned by defendant leaving jurisdiction after indictment); *United States v. Mers,* 701 F.2d 1321, 1332 n.5 (11th Cir.) (exclusion of period while defendant was unavailable for trial not disputed), *cert. denied,* 464 U.S. 991(1983); *United States v. Stafford,* 697 F.2d 1368, 1374-75 (11th Cir. 1983)(delay caused by failure to appear at hearing excluded); *Hill v. Wainwright,* 617 F.2d 375, 378 (5th Cir.1980)(decided before effective date of STA sanctions); *United States v. Walters,* 591 F.2d 1195, 1201 (5th Cir.)(same), *cert. denied,* 442 U.S. 945 (1979); *United States v. Felton,* 592 F.Supp. 172, 184 (W.D.Pa.1984), *rev'd in part on other grounds,* 753 F.2d 256, 276

These holdings comport with the plain language of the STA. Since section 3161(h)(3) expressly provides a scheme for considering the effect of a defendant's absence or unavailability, we should not try to improve upon the statutory scheme by implying a provision restarting the clock upon apprehension of an absent defendant. Indeed, holding that the clock is to be restarted whenever a defendant is absent or unavailable would render section 3161(h)(3) meaningless. There could be no purpose in the exclusion of delays instigated by a defendant's absence or unavailability if the clock would instead be restarted upon his reappearance. We will not accept an interpretation of a statute which renders any part of the statutory scheme superfluous. *People of California v. Tahoe Regional Planning Agency,* 766 F.2d 1308, 1314 (9th Cir.), *amended,* 775 F.2d 998 (9th Cir. 1985).

Moreover, the legislative history of the STA indicates that Congress was aware of the potential problems in quickly bringing to trial a defendant who became a fugitive when the time clock was just about to expire. For example, in 1971, then Assistant Attorney General William H. Rehnquist suggested that the STA legislation include a special provision allowing additional time after a fugitive defendant has been apprehended:[3]

> Further, if a defendant is available for 58 days prior to trial, but then becomes a fugitive for two years,

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(3rd Cir. 1985); *United States v. Steinberg,* 478 F. Supp. 29, 33 (N.D.Ill.1979)(seven-year delay did not violate STA where defendant left country shortly before indictment); *see also United States v. Pena,* 793 F.2d 486, 488-90 (2d Cir.1986)(delay attributable to fugitive co-defendants excludable against defendant under § 3161(h)(7), as cases involving multiple defendants are governed by single STA clock); *United States v. Zielinski,* 519 F. Supp. 870, 872 (M.D. Pa. 1981)(construing both delay prior to capture of fugitive and short delay after return to charging district as excluded under § 3161(h)(3)(A)).

[3] Comments on S.895 in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, October 19, 1971, at 1971

> under section 3161(c)(3), upon his rearrest, the Government would only have two days to bring him to trial. This is obviously impossible since the evidence could not be reassembled on such short notice. We therefore believe that the terms "absence" and "unavailability" should be defined and that specific provisions should be made for situations where the defendant become a fugitive.

Deputy Attorney General Joseph T. Sneed also warned the Congress:[4]

> A defendant could "skip" bail on the 59th day of the time period and once apprehended, the Government would have 1 day within which to reassemble the evidence and to try him. This results in the anomalous situation of an escapee being given priority as to a trial date over those defendants who have abided by the conditions of their bail.

To address this perceived flaw in the legislation, the Justice Department proposed an amendment providing that a defendant who failed to appear for trial would be deemed arraigned only upon the date of his subsequent appearance before the court after his apprehension.[5] In effect, the amendment would have restarted the STA time clock when the fugitive defendant was brought before the

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Senate Hearings 254-55, *reprinted in* A. PARTRIDGE, LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974 at 120 (Fed. Judicial Center 1980)(hereinafter cited as "LEGISLATIVE HISTORY"). As is evident from the text, the statute as originally proposed had a 60-day limitations period.

[4] Testimony of Deputy Attorney General Joseph T. Sneed, 1973 Senate Hearings 114, *reprinted in* LEGISLATIVE HISTORY at 122.

[5] "Department of Justice Proposed Amendments to Title I of S. 895," Appendix to Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 262, *reprinted in* LEGISLATIVE HISTORY at 121.

court where the charge was pending.[6] The proposed amendment was not adopted.

Despite the fact that these concerns were raised, and alternative approaches suggested, Congress decided to address the problem of fugitive defendants through section 3161(h)(3) and excluded only that the period during which the defendant was missing.

As the district court ruled in this case, "The STA specifically provides that delay resulting from the unavailability of the defendant constitutes excludable time, § 3161(h)(3)(A), not that defendant's return to a district after flight and recapture starts the running of an entirely new 70-day period. If Congress had intended the latter result, it would have said so."

The United States argues that the clock should nevertheless begin anew when a fugitive defendant is apprehended because Congress intended that "if a climactic and unpredictable event occurs that disrupts the customary flow of a prosecution, the defendant is to be tried within seventy days of that event." The United States

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[6] Assistant Attorney General Rehnquist described the proposed amendment as making –

> provision for the situation where a defendant becomes a fugitive. We have alluded to the problem posed where the defendant becomes a fugitive near the end of the time period (e.g., on the 178th day), and is subsequently captured after a lengthy absence. In this case, S.895 would require that the Government try the defendant within the days under the 180-day limit which had not expired (e.g., 2 days). Obviously, it would be impossible for the Government to marshal the evidence on such short notice where only a few days remain upon re-apprehension of the defendant. Thus, the section contains a provision which allows a new time period to run in such cases.

Explanation of Proposed Amendments in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971 at 1971 Senate Hearings 259, *reprinted in* LEGISLATIVE HISTORY at 121-22.

attempts to analogize a defendant's flight from trial to sua sponte dismissal by the trial court, grant of a mistrial or new trial, and withdrawal of a plea of guilty or nolo contendere. The STA period is restarted with the occurrence of these latter events; the government contends it should also be restarted when a defendant fails to appear.

We reject this analogy because the STA specifically provides that the clock is restarted for withdrawal of a plea, 18 U.S.C. § 3161(i),[7] and declaration of mistrial or new trial, 18 U.S.C. § 3161(e).[8] Moreover, we recently held that a sua sponte dismissal by the trial court constitutes "a charge . . . dismissed or otherwise dropped" under section 3161(d), which provides that the clock be restarted under such circumstances. *United States v. Feldman,* 788 F.2d 544, 549 (9th Cir. 1986). By contrast, the statute does *not* allow restarting the clock when the defendant is unavailable, 18 U.S.C. § 3161(h)(3)(A), it only excludes such periods from the 70-day calculation.

Our holding today does not mean that a defendant will benefit by absconding from the trial court's jurisdiction just before the STA clock runs or trial is scheduled to begin. There remain substantial criminal sanctions which

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[7] Section 3161(i) provides:

> If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty of nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the pleas becomes final.

[8] Section 3161(e) provides:

> If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final.

attach to a defendant's failure to appear for trial. *See* 18 U.S.C. § 3146. Furthermore, if there is insufficient time remaining for effective trial preparation upon the fugitive defendant's apprehension, the district court retains the discretion to grant a continuance to serve the "ends of justice" under 18 U.S.C. § 3161(h)(8)(A). *See United States v. Kamer,* 781 F.2d 1380, 1389-90 (9th Cir.), *cert. denied,* 107 S. Ct. 80 (1986); *United States v. Gallardo,* 773 F.2d at 1505-06. In this case, the district court found that the STA clock had expired due to government delays before the defendant had even been returned to the Western Disrict of Washington. Consequently, no continuance could have been requested or granted.

Finally, although we hold that the plain language of the statute precludes an order to restart the clock upon the fugitive defendant's apprehension, the trial court may certainly take into account the defendant's culpable absence in deciding whether any resulting dismissal for violation of the STA should be with or without prejudice.

III

APPLICATION OF EXCLUSIONS

We now turn to the calculation of the number of nonexcludable days between the date of Taylor's arrest in California and the date upon which the United States District Court for the Western District of Washington granted the dismissal. We review de novo the district court's method of computing excludable days under the STA, and we review the factual findings underlying the STA determination under the "clear error" standard. *United States v. Gallardo,* 773 F.2d at 1501; *United States v. Henderson,* 746 F.2d at 622.

As explained above, the defendant concedes that the period of time between his flight on November 19, 1984, and his arrest on February 5, 1985, was excludable under

section 3161(h)(3)(A). The parties also concede that the short delay while Taylor was in state custody on February 6 and 7 was excludable; the delay attributable to removal proceedings between March 6 and April 3 was excludable under 18 U.S.C. § 3161(h)(1)(G); and the period during which Taylor was held for testimony in the Northern District of California, between February 7 and 22, and again between April 18 and 24, was excludable. Although the district court did not consider it, apparently it was assumed that the period after April was excludable because of the superseding indictment.

Two time periods are disputed, the eleven days between February 23 and March 5, and the fourteen days between April 4 and 17. Both are periods during which Taylor was in the custody of the United States Marshal Service. The district court concluded that fifteen of these days counted against the 70-day time clock.

Between February 23 and March 5, Taylor was still in custody in San Francisco following his testimony at the *United States v. Seigert* trial in the Northern District of California. The government contends that the six days between February 23 and February 28 should be excluded as processing time during which Taylor was effectively in state custody on a charge of petty theft. The district court properly rejected this argument. Although the San Francisco sheriff had been ordered to return Taylor to state custody in San Mateo, the USMS retained custody of Taylor in San Francisco. Consequently, we cannot regard these six days as tantamount to Taylor's having been in state custody on the pending petty theft charge. Moreover, this argument hardly accounts for the remaining five day delay between March 1, the day after the San Mateo County charges against Taylor were dropped, and March 5, the day before he was finally brought before a federal

magistrate in the Northern District of California on the federal bench warrant.[9]

The second disputed period of time began April 4, after the magistrate in California ordered Taylor's removal to the Western District of Washington, and ended April 17, the day before he was ordered returned from Portland, Oregon to testify again in the Northern District of California. The government contends this entire period should be excluded, arguing that when a defendant absconds and is apprehended in a distant jurisdiction, the USMS may consider matters of economy in arranging transportation back to the charging jurisdiction. In this instance, the USMS delayed Taylor's transportation to the Western District of Washington while it collected a larger number of prisoners to transport together.

The government's position in not supported by the statute. On the matter of transportation of defendants between jurisdictions, section 3161(h)(1)(H) of the STA is straightforward:

(h) The following periods of delay shall be excluded in

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[9] The government contends that, when a defendant is arrested outside the charging district, the government must be allotted a reasonable period of time within which to bring him before a magistrate to initiate removal proceedings. This argument may have merit, but it does not assist the government in this case. The government was not placed in the position of rushing the defendant from the site of his arrest to the nearest magistrate. In this case, Taylor had been in federal custody for fifteen days during the *Seigert* trial, and another eleven days afterward before he was brought before a magistrate. Had the government truly been solicitous of the requirements of the Speedy Trial Act, it could easily have arranged for removal proceedings to begin promptly upon completion of the *Seigert* trial testimony. Its failure to do so was yet another example of what the district court found was "lackadaisical behavior" on the government's part.

computing the time within which . . . the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to–

. . .

(H) delay resulting from transportation of any defendant from another district, . . . except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable . . . .

See also United States v. Greene, 783 F.2d 1364, 1368 (9th Cir.), *cert. denied*, ____ U.S. ____, 106 S. Ct. 2923 (1986).

Under 18 U.S.C. § 3161(h)(1)(H), the ten days from April 4 through April 13 were excludable. The remaining four days must be presumed unreasonable. The government failed to rebut the presumption that these additional days taken to transport Taylor to the Western District of Washington were not reasonable. Ten days is surely ample time within which to remove an individual from northern California to western Washington. The legislative history indicates that delays to accommodate the USMS, in its desire to effect economical transportation of prisoners in larger groups, are not excludable under the Act.[10]

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[10] In the House Report accompanying the Speedy Trial Act legislation, the committee expressly rejected the argument that additional time should be allowed to permit economical transportation of prisoners in larger groups:

> In addition, the Justice Department noted that other delays may also arise prior to arraignment in the charging district. As an example, the Department cites the difficulty in moving prisoners coming into the district from out-of-state. In this regard, Mr. Treece said:
>
> > For example, prisoners aren't moved immediately when ready because the marshals try to make their trips worthwhile by combining the movement of several prisoners. So it may take several weeks to get a prisoner from Florida to Colorado during which time he will be provided an attorney and perhaps have a hearing relative to his removal. [Hearings, p. 206.]
>
> The Committee cannot conclude that inconvenience to the United States marshals or the minimal expense of transporting prisoners is an excuse for delaying the arraignment of a defendant.

H.Rep.No.1508, 93d Cong., 2d Sess.(1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 7401, 7423-24. *See also* Testimony of James L. Treece and H. M. Ray, Members, Advisory Committee of U.S. Attorneys, 1974 House Hearings 211-13, *reprinted in* LEGISLATIVE HISTORY at 124-25.

The House Report discussion quoted above concerned the ten day indictment-to-arraignment requirement which was originally enacted in 1974 as part of 18 U.S.C. § 3161(c). Pub. L. No. 93-619, title I, § 101, 88 Stat. 2076, 2077 (1975). The 1979 amendments to the Speedy Trial Act merged this ten day indictment-to-arraignment requirement and the sixty day arraignment-to-trial limit into a single seventy day indictment-to-trial period. Pub. L. No 96-43, § 2, 93 Stat. 327 (1979). Accordingly, Congressional intent not to permit additional delays to accommodate the marshals during the original ten-day period before arraignment would now apply with full force to the larger seventy-day period.

Finally, the government contends that the entire period following Taylor's apprehension should be excluded if the government exercised "due diligence" in procuring his return to the charging jurisdiction. This "due diligence" requirement applies only in the context of an "unavailable defendant" under 18 U.S.C. § 3161(h)(3)(A), (B). Where the defendant's whereabouts are known, the government must exercise "due diligence" to secure his appearance at trial. If his appearance cannot be secured even through "due diligence," the defendant will be regarded as "unavailable" and any resulting delay is excludable from the STA time clock. 18 U.S.C. § 3161(h)(3)(A), (B). Consequently, the delays occurring while Taylor was in state custody, while he was being held to testify in the Northern District of California, and while he was resisting removal

from California to the Western District of Washington were excludable because Taylor was effectively "unavailable" during that period. The exclusion of these periods, however, is not at issue in this case.

During the two disputed periods, totaling fifteen days, Taylor was not "unavailable;" he was in the custody of the USMS, and within the full control of the federal government. The government simply failed to bring him promptly before a federal magistrate to initiate removal proceedings and to transport him to the charging jurisdiction within ten days after the removal order and that failure resulted in the delays which count against the 70-day time limit.

We affirm the district court's conclusion that fifteen days of non-excludable time elapsed after Taylor's apprehension. The 70-day clock was thus exceeded by fourteen days.

IV

DISMISSAL WITH PREJUDICE

The Speedy Trial Act provides that dismissal of the indictment upon motion of the defendant is mandatory when the 70-day statutory period is exceeded. 18 U.S.C. § 3162(a)(2). The dismissal may be with or without prejudice. In making this determination, the trial court is to consider, among others, the following factors: "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the STA] and on the administration of justice." *Id.*

We review the district court's decision to dismiss Taylor's indictment with prejudice for an abuse of discretion. *See United States v. Frey*, 735 F.2d 350, 353 (9th Cir.1984).

The district court recognized that the drug violations with which Taylor was charged were serious. The fourteen

day delay beyond the STA 70-day period, although not wholly insubstantial, was not so great as to mandate dismissal with prejudice. Although there is no indication that the delay would have prejudiced Taylor in preparing for trial, he did suffer prejudice in that he was incarcerated during the entire period.

In ordering dismissal with prejudice, the district court focused primarily upon the government's failure to bring Taylor promptly before a magistrate during the eleven days he was in federal custody following the *Seigert* trial, and the unreasonable delay by the USMS in transporting him to the Western District of Washington after the removal order was issued. The court decried the "government's lackadaisical behavior in this case," and the fact that the government "placed more value on accommodating the convenience of the USMS than in complying with the plain language of the STA."[11]

The court also held that "the administration of the STA and of justice would be seriously impaired if the court were not to respond sternly" to the violation. Under the circumstances, the district court found dismissal with prejudice was mandated because "if the government's behavior in this case were to be tacitly condoned by dismissing the

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[11] We recognize that other circuits have held that mere negligence or inadvertence on the part of the government, resulting in delay in bringing a defendant to trial, does not automatically mandate dismissal with prejudice, at least where other factors militate in favor of reprosecution. *United States v. Russo*, 741 F.2d 1264, 1267 (11th Cir. 1984); *United States v. Carreon*, 626 F.2d 528, 533 n.9 (7th Cir. 1980); *see also United States v. Hawthorne*, 705 F.2d 258, 261 (7th Cir. 1983)(dismissal under 18 U.S.C. § 3162(a)(1) for failure to file indictment with 30 days of arrest). However, the district court found the government's conduct in this case reflected an apparently bad faith "lackadaisical" attitude. The district court concluded that such an indifference toward the mandates of the Speedy Trial Act should not be tolerated.

indictment without prejudice, then the STA would become a hollow guarantee."

The purpose of the district court's order was to send a strong message to the government that the STA must be observed, despite the government's apparent antipathy toward a recaptured fugitive. Under the peculiar circumstances of this case, we see no need to disturb that ruling on appeal. The district court acted within the bounds of its discretion.

AFFIRMED.

POOLE, Circuit Judge, concurring in part and dissenting in part.

Concededly, the defendant was not brought to trial until 14 days beyond the time prescribed by the Speedy Trial Act, considering the period in which delay was excludable under 18 U.S.C. § 3161(h). Where a defendant is not brought to trial within 70 days from the date the indictment is returned or (in case of information) from the date of an initial appearance before a magistrate in the district of the prosecution, dismissal is mandatory. But the court has discretion, and is obligated, to determine whether the dismissal should be with or without prejudice. The district court dismissed the indictment (and with it the entire case against the defendant) with prejudice. I believe this was entirely uncalled for and constituted an abuse of allowable discretion.

Taylor was scheduled for trial on very serious charges of conspiracy to possess cocaine (21 U.S.C.§ 846) and for possession of cocaine with intent to distribute (21 U.S.C.§ 841(a)(1)), and for aiding and abetting (18 U.S.C.§ 2). He was to have been tried in Seattle, Western District of Washington, on November 19, 1984. He did not show up for trial and a fugitive warrant was issued. He successfully avoided capture for 78 days, until February 5, 1985, when he was taken into custody on state charges by the Sheriff of San Mateo County, California. Two days later the Sheriff delivered Taylor to the United States Marshal pursuant to an outstanding writ of habeas corpus ad testificandum which had been issued out of the United States District Court, Northern District of California, where his testimony was required in another narcotics prosecution, *United States v. Seigert*. Under that authority he was detained in federal custody through February 22, 1985. Thereafter, on February 28, the state charges upon which the Sheriff had arrested Taylor were dismissed, and on March 1 the Federal Marshal was informed that the

"holds" on Taylor were dismissed. As of that date Taylor was a fugitive in custody in the Northern District of California charged in a complaint under the Federal Fugitive Act with having fled from the Western District of Washington, Seattle. On April 3, a United States Magistrate entered an order directing the Marshal to transport Taylor back to Seattle. That Friday (April 5) began the Easter weekend and on Monday, April 8, Taylor was transferred from jail in San Francisco to Sutter County jail in Northern California. He remained there until April 17 while the Marshal assembled other prisoners for transport to the districts of Oregon and Washington. On April 17 Taylor arrived in Portland, but on the next day, April 18, the district court in San Francisco issued a second writ of habeas corpus ad testificandum requiring Taylor to be brought back to San Francisco for the second trial of defendant Seigert. He was returned to San Francisco on April 23 and was held there during the trial which began on May 7. On May 17 Taylor was returned to the Western District of Washington.

The district court concluded that the period of detention between February 23 and March 5, 1985 constituted 11 days of federal custody following Taylor's appearance in the *Seigert* trial, and rejected the government's contention that he had only been temporarily in federal custody for the 6 day period between February 23 and February 28 because be was to have been returned to state custody.

It is true that Taylor was not "effectively in state custody" during this time. A state court judge cannot "order" the United States Marshal to deliver a prisoner to the state court. However, all the San Mateo County authorities had to do in order to exercise state custody was to come to the San Francisco county jail with the required papers and take custody of the prisoner after notifying the United States Marshal, who would then "sign off." The record does not indicate why San Mateo did not physically transport Taylor across the county line from San Francisco to San Mateo. Under the circumstances, however, informed as it was of the state holds and that its custody of Taylor could be interrupted at any moment, the government cannot be found "lackadaisical" *see Maj. Op.* at 13 n.9, or irresponsible in not immediately having taking advantage of these few days of Taylor's presence to begin proceedings against him.

Furthermore, when on March 1 the Marshal was notified that the state petty theft charges against Taylor had been dismissed and the "local holds" should be released, there was another outstanding federal charge (violation of the Federal Fugitive Act) pending against Taylor. On March 6 he came before a federal magistrate for arraignment on that charge and for removal proceedings under Rule 40 of the Federal Rules of Criminal Procedure. The trial judge and majority find the period between March 1 and March 5 an unjustifiable delay necessitating dismissal with prejudice. *See* Maj. Op. at 13. This approach is likewise unduly harsh. March 1 was a Friday. We do not know at what time of day the Service was notified of the release of local holds on Taylor, but if it was in late afternoon, the ability to process and move Taylor before the following Monday, March 4, would be doubtful. For some reason not apparent in the record, Taylor could not be brought before the charging magistrate until Wednesday the 6th. If Taylor appeared on the morning of the day, the majority's rationale for dismissal with prejudice in this case would have been founded upon a mere 24-hour delay. The district court does not exercise the discretion of the statute in coming to such a Draconian result.

The other critical period of time was that which elapsed between the date of April 3 when the Magistrate signed the papers transferring Taylor back to Washington, and April 18 when he was ordered to return from Portland back to San Francisco. The majority has found that most of this delay occurred while the Marshal waited to collect a larger

number of prisoners for simultaneous transport in order to effect economy of expenses.

It seems clear to me that none of the delay shown in this case—although admittedly non-excludable under the statute—was of such studied, deliberate, and callous nature as to justify dismissal with prejudice. The Marshal was not indifferent to the duty to move prisoners as to invite the harsh sanction of dismissal with prejudice, barring forever a public trial of the defendant on very serious violations of the narcotics laws. Congress intended to give to district judges some substantial leeway in deciding how to treat delays in bringing a defendant to trial. This case presents the incongruous situation where a defendant can be the instrument of his own deliverance. Taylor fled the day before his scheduled trial. He created his own 78-day "excludable time" by his own will, traveling from Seattle to California where he became the subject of criminal charges in two jurisdictions 800 miles away from the place of trial. It is ironic that the statutory scheme which would have assured his orderly trial in November 1984, is resorted to, five months later, as the reason for "springing" him to freedom and conferring upon him complete absolution from further prosecution. The delay we review in this case—a few days—rises to no level of constitutional wrong. The majority says that in opening the door to freedom for this defendant, the trial judge sought "to send a strong message." The context of that message reflects badly upon our notions of sound, evenheaded administration of justice. Consequently, I write this dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C84-204R

UNITED STATES OF AMERICA, PLAINTIFF

v.

LARRY LEE TAYLOR, DEFENDANT

[Filed Aug. 1, 1985]

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS FOR SPEEDY TRIAL ACT VIOLATIONS

THIS MATTER comes before the court on a motion by defendant Taylor to dismiss all counts of the indictment pending against him on the grounds that the government violated the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* Having carefully reviewed defendant's motion together with all memoranda, affidavits and exhibits filed in support and in opposition to the motion, the court finds and rules as follows:

I. FACTUAL BACKGROUND

Unless otherwise noted, the following facts are undisputed: On November 19, 1984, defendant was scheduled to go to trial in this court pursuant to an indictment charging narcotics violations. When defendant failed to appear, this court issued a bench warrant for defendant's arrest. On February 5, 1985, defendant was arrested by officers of the Sheriff's Department on San Mateo County,

California. The government contends that defendant was arrested pursuant to both this court's warrant and to a bench warrant issued by Judge Edward Pliska of San Mateo County Municipal Court following defendant's failure to appear for a court date on pending petty theft charges. Defendant's attorney avers that the officers who participated in the arrest said they acted pursuant to a fugitive warrant out of Seattle. In any case, there is no dispute that defendant was booked into the San Mateo County Jail on February 5, 1985 in the custody of the San Mateo County authorities.

However, on February 7, 1985, the United States District Court for the Northern District of California issued a writ of habeas corpus ad testificandum because defendant was needed as a witness for the defense in a pending federal narcotics case, *United States v. Seigert*, CR84-689RFD. Pursuant to that writ, the United States Marshal Service ("USMS") took defendant into federal custody two days after his arrest. The trial in *Seigert* was then continued until February 20, 1985. Defendant remained in federal custody in the San Francisco Jail until he testified in *Seigert* on February 21, 1985. The USMS was then instructed to hold him for possible recall in the *Seigert* trial, which ended on February 22, 1985.

The government emphasizes that this period of federal custody was only temporary because defendant was still San Mateo County's prisoner and because the USMS had an obligation to return him to local custody. Be that as it may, defendant was never returned to San Mateo authorities after the end of the *Seigert* trial. In fact, according to defendant's attorney's affidavit, defendant remained in federal custody in the San Francisco County Jail even though San Mateo County Judge Pliska issued an order on February 20, 1985, requiring defendant's presence in his courtroom on February 28, 1985. Then, on March 1, 1985, the USMS received a teletype from the Sheriff at the San Mateo County Jail indicating that the

San Mateo case pending against defendant had been dismissed and that any existing local holds on defendant should be erased.

On March 6, 1985, defendant made an initial appearance before a United States Magistrate for the Northern District of California pursuant to the bench warrant issued by this court. On March 8, 1985, the magistrate ordered a physical examination of defendant. On April 3, 1985, at defendant's Rule 40 removal hearing, he waived an identity hearing. On the same date, the magistrate signed an order directing defendant's removal forthwith to this district.

On April 8, 1985, defendant was transferred from the San Francisco County Jail, where he had been since February 7, 1985, to Sutter County Jail in California. Defendant stayed there until April 17, 1985 because the USMS was waiting to assemble several prisoners for transport to Oregon and Washington rather than traveling with defendant alone.

On April 17, 1985, defendant was transported to the Multnomah County Jail in Portland, Oregon. But on April 18, 1985, the United States District Court for the Northern District of California issued a second writ of habeas corpus ad testificandum ordering defendant's attendance at a retrial of *Seigert*. Defendant therefore remained in Portland, Oregon until a Seattle Deputy Marshal became available to fly with him back down to California on April 23, 1985. Retrial of the *Seigert* case was held on May 7, 1985. From May 6, 1985 to May 13, 1985, defendant remained in the San Francisco County Jail. On May 13, 1985, defendant was transferred to the Sacramento County Jail; on May 16, 1985 to the Multnomah County Jail; and on May 17, 1985 to the Pierce County Jail in this district.

Meanwhile, on April 24, 1985, a grand jury in this district issued a superseding indictment charging defend-

ant with three counts of criminal violations. The first two counts are the same as those charged in the original indictment. Count III alleges a violation of 18 U.S.C. § 3150 for failure to appear for trial on November 19, 1984.

II. LEGAL ARGUMENT

A. Motion to Dismiss Counts I and II

Pursuant to the Speedy Trial Act ("STA"), 18 U.S.C. § 3161(c)(1), a defendant must be brought to trial within 70 days of his or her indictment or initial appearance in the charging district, whichever occurs later. Under § 3161(h), however, certain periods of delay are excludable from the calculation of time elapsed. Based on the facts set forth above, defendant argues that, as to Counts I and II of the original indictment, the government failed to comply with the STA and that those counts must be dismissed under § 3162(a)(2).

The government does not dispute that as of November 19, 1984, defendant's original trial date on Counts I and II, only one day of speedy trial time remained under § 3161(c)(1). But the government first contends that a new 70-day period began under § 3161(c)(1) when defendant was arrested. The government asserts that under other unpredictable, disruptive circumstances where the customary flow of the prosecution is interrupted, the 70-day period starts running anew from the date of the disruptive event because Congress did not intend the government to be penalized by the occurrence of events over which it has no control. Examples include a declaration of mistrial, the reinstatement of an indictment following appeal, or the withdrawal of a defendant's guilty plea. § 3161(d)(2), (e) and (i). The government argues that, pursuant to this reasoning, a new 70-day period should start running from the time of defendant's return to this district after his recapture.

The court finds no authority for this argument nor does the language of the STA support it. The STA specifically provides that delay resulting from the unavailability of the defendant constitutes excludable time, § 3161(h)(3)(A), not that defendant's return to a district after flight and recapture starts the running of an entirely new 70-day period. If Congress had intended the latter result, it would have said so.

Thus, the court must examine the time elapsed between November 19, 1984 and April 24, 1985 to determine how much of that is excludable under § 3161(h) and whether the government violated the STA. Defendant concedes that the period of time between his flight on November 19, 1984 and his arrest on February 5, 1985 falls under § 3161(h)(3)(A), which makes excludable any period of delay attributable to the unavailability of the defendant. Defendant also concedes that the time between March 6, 1985, the date of his initial appearance before a magistrate in California, and April 3, 1985, the date on which the magistrate ordered his removal to this district, is a period of delay attributable to removal proceedings and, therefore, excludable under § 3161(h)(1)(G). The remaining time periods which the court must examine for excludable time are two in number: (1) February 6, 1985 through March 5, 1985; and (2) April 4, 1985 through April 23, 1985.

Looking at the first period, defendant was in state custody from February 6 until February 7, 1985. The USMS then took custody of defendant pursuant to the writ from the Northern District of California. The trial at which defendant's testimony was required ended on February 22, 1985. The court concludes that the time through February 22, 1985 is excludable under the general language of § 3161(h), which covers "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to—[certain specified proceedings]." *Compare United States v. Rodriguez-Franco,*

749 F.2d 1555 (11th Cir. 1985); *United States v. Lopez-Espindola*, 632 F.2d 107 (9th Cir. 1980).

Defendant then remained in federal custody for eleven more days, from February 23, 1985 to March 5, 1985, until he was finally brought before a magistrate on March 6, 1985 pursuant to the bench warrant issued by this court. The government argues strenuously that until February 28, 1985, defendant was only in temporary federal custody because the USMS was holding him with the understanding that he would be returned to state custody at the end of the *Seigert* trial. Then, on February 28, 1985, the state charges were dropped, clearing the way for the USMS to obtain sole custody. Because of the persisting state hold, the government contends that this whole period is excludable.

Under the circumstances of this case, the court must reject the government's argument. Whatever defendant's status was with regard to the state charges, the fact is that the USMS retained custody of defendant. The relative importance which the government placed upon the state hold is amply demonstrated by the failure of the USMS to produce defendant in San Mateo County Court on February 28, 1985 despite a direct order from Judge Pliska of that court. The court concludes that the period of six days from February 28, 1985 is not excludable.

As for the period from March 1 to March 5, 1985, the government implicitly concedes that this period does not fall within any statutory exclusion. Therefore, five more days passed for purposes of § 3161(c).

Turning to the second period of time, April 4, 1985 through April 23, 1985, the important fact is that the magistrate in California ordered defendant's removal to this district on April 3, 1985. The STA, § 3161(h)(1)(H), provides an exclusion for

> delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, *except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable.*

(Emphasis supplied.) Thus, the period of delay through April 13, 1985 is excludable. However, the four days which then elapsed before the writ commanding defendant's return to California was issued on April 18, 1985 must be presumed an unreasonable delay. The government attempts to rebut this presumption by arguing that the length of the trip was defendant's fault: if he had not escaped and been recaptured in California, then the government would not have had to transport him such a long distance. This argument is not persuasive. Surely Congress knew when it established the presumption that defendants would not always conduct their lives so as to enhance the government's convenience.

Finally, the court concludes that the period from April 18, 1985 to the conclusion of the *Seigert* trial, which occurred after April 24, 1985, is excludable under the general language of § 3161(h) concerning other proceedings.

To summarize the above discussion, the conclusion is inescapable that the government did violate the STA. The court rules that, even allowing the government a full ten days to effectuate the defendant's return to this district, there elapsed at least fourteen days of nonexcludable time in excess of the 70-day requirement set forth in § 3161(c)(1) prior to April 24, 1985, the date on which the government filed the superseding indictment against defendant. Therefore, pursuant to § 3162(2), Counts I and II of the original indictment must be dismissed. The real question is whether this dismissal should be with or without prejudice. On this point, the STA, § 3162(2), provides as follows:

> In determining whether to dismiss the case with or without prejudice, the court shall consider, among

> others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

Regarding the first factor as applied to the instant case, there is no question that the drug violations with which the defendant is charged are serious. However, the second factor, the circumstances of the case leading to the dismissal, tends strongly to support the conclusion that the dismissal must be with prejudice. There is simply no excuse for the government's lackadaisical behavior in this case. Despite the government's insistence on the temporary nature of the federal custody from February 7 until February 28, 1985, the USMS did not return defendant to state authorities after the purported reason for that temporary custody had ended on February 22, 1985. Even more telling is the failure of the USMS to produce defendant on February 28, 1985 pursuant to a specific court order from a San Mateo County judge.

After the state hold was dropped, it took the government six more days to arrange for defendant's initial appearance before a magistrate despite the fact that he had been in federal custody in the district for almost a month. Nor did the order of removal issued of April 3 prompt any particular show of concern on the government's part. Instead of responding with dispatch, the government apparently placed more value on accommodating the convenience of the USMS than on complying with the plain language of the STA. Pursuant to the third factor, the court concludes that the administration of the STA and of justice would be seriously impaired if the court were not to respond sternly to the instant violation. If the government's behavior in this case were to be tacitly condoned by dismissing the indictment without prejudice,

then the STA would become a hollow guarantee. Counts I and II of the original indictment must be dismissed with prejudice.[1]

B. Motion to Dismiss Count III

Defendant also moves to dismiss Count III of the superseding indictment, the failure to appear charge, pursuant to § 3162(a)(1) on the grounds that under § 3161(b), the indictment charging him with the commission of that offense should have filed within 30 days from the date on which he was arrested.

The government responds that in order for the 30-day period to start running, the defendant must have been "arrested or served with a summons in connection with such charge." § 3161(b). The government argues that the arrest warrant pursuant to which defendant was arrested was not related to, and defendant was not arrested on, a formal charge brought against him for his failure to appear, thus making § 3161 inapplicable. In support of this argument, the government cites *United States v. Stead*, 745 F.2d 1170, 1173 (8th Cir. 1984); *United States v. Wilson*, 690 F.2d 1267, 1276 (9th Cir. 1982); and *United States v. Lyon*, 567 F.2d 777, 781 n.3 (8th Cir. 1977).

The court finds the above-cited cases distinguishable and rejects the government's argument. Both *Stead* and *Wilson* involved the recapture of escapees from prison who were later indicted for the escapes. Under those circumstances, the court held that the arrests were a continuation of defendants' incarcerations pursuant to their original convictions and not arrests in connection with

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[1] The court realizes the incongruity of dismissing with prejudice portions of an indictment which is no longer in effect because it has been superseded. However, this approach appeared to be the most logical way to proceed under the rather curious circumstances of this case. The real effect of the court's ruling is, of course, that Counts I and II of the superseding indictment, which simply echo the original indictment, must be dismissed with prejudice.

their escapes. In *Lyon*, the facts appear more similar to defendant's situation, but the discussion is so minimal that this court cannot effectively evaluate the underlying reason for the ruling.

In the instant case, the court finds it unreasonable and illogical to say that defendant was not arrested "in connection with" the charge of failure to appear for which he was later indicted. The bench warrant specifically cited failure to appear as the basis for the court order. At the defendant's initial appearance on March 6, 1985 before a magistrate after his arrest, a deputy marshal submitted an affidavit stating that on November 19, 1984, this court had filed an order charging defendant with violation of 18 U.S.C. § 3150 in that he failed to appear for trial. There is no question that defendant's arrest in California was, at least in part, pursuant to that court order.

If defendant was arrested in connection with the charge of failing to appear, then the government had 30 days in which to indict him under § 3161(b). However, the excludable periods of delay listed in § 3161(h) are also applicable in computing the time within which an indictment must be filed. Thus, the following periods are excludable: February 5 through February 22, 1985 under the general language of § 3161(h); March 6 through April 3, 1985 under § 3161(h)(1)(G); April 4 through April 13, 1985 under § 3161(h)(1) (H); April 18 through April 23, 1985 under the general language of § 3161(h). Defendant was indicted for failure to appear on April 24, 1985.

Based on the above analysis of the relevant time period, the court concludes that the government did not violate § 3161(b) because less than 30 days elapsed between defendant's arrest and his indictment if one takes into account the excludable periods of delay.

The court notes that defendant did request an evidentiary hearing on his motion to dismiss. However, that request was made before the government came forward with

a detailed explanation of the defendant's whereabouts during the time in question. The court believes that it now has all the relevant information necessary to rule on defendant's motion and cannot discern any reason for a hearing. But if after reading the instant order, defendant still perceives the necessity for an evidentiary hearing, he shall so inform the court within ten days of the issuance of this order.

In conclusion, the court GRANTS defendant's motion to dismiss Counts I and II of the original indictment with prejudice and DENIES defendant's motion to dismiss Count III of the superseding indictment.

IT IS SO ORDERED.

The Clerk of the Court is directed to forward copies of this Order to counsel of record.

DATED at Seattle, Washington this 1st day of August, 1985.

/s/ BARBARA J. ROTHSTEIN

Barbara J. Rothstein
United States District Judge

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